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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 381.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNIONS NOS. 128, 633 and 954,

Petitioners,

vs.

LION DRY GOODS, INC., *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF TO RESPONDENTS' OPPOSITION TO THE PETITION FOR CERTIORARI.

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I.

Since the drafting of the original petition in this case, the Court of Appeals for the Ninth Circuit has ruled on a major point of law directly contrary to the holding of the Sixth Circuit in this proceeding. *Association of Industrial Scientists v. Shell Development Company*, ____ F. 2d ____, 59 LRRM 2770, No. 19426, decided June 29, 1965.

At issue in the *Shell Development* case in the Ninth Circuit was whether a union had "standing" to bring a case to arbitration when the contract provided for an employee's signed request to process a grievance. The District Court had ruled, just as the Sixth Circuit has decided here, that under such a contract clause, the union had no right to process a case to arbitration without strict compliance with the contract's requirement of individual employee action. The Ninth Circuit, after carefully reviewing what this Court said in *John Wiley & Sons v. Living-*

ston, 376 U. S. 543, reversed the District Court and reached this conclusion, at ____ F. 2d ____, 59 LRRM 2770, 2772.

> We think the question, whether a given grievance may be processed by a duly constituted bargaining agent of an employee or by the individual employee, can only be characterized as a procedural matter. Compliance with the grievance procedures bears not at all upon the question of whether the grievance is of a substantive nature embraced by the agreement to arbitrate. Moreover, the proper scope of the agent's authority and the nature of his role in matters concerning labor disputes would appear to be a question peculiarly within the province of the arbitrator possessing, as he does, "knowledge of the common law of the shop" and the ability to "bring to bear considerations which are not expressed in the contract as criteria for judgment." Steelworkers v. Warrior & Gulf Co., supra, 363 U. S. at 582.

This is in sharp conflict with the holding of the Sixth Circuit in this case, which ruled that the unions here are not given the "right" under the contract to process a matter to arbitration. The Sixth Circuit pointed out that Paragraph 7 of the Statement of Understanding gives the right of arbitration to any individual employee who may have a grievance, and underscored the words, "individual employee." Since the unions, not the employees, sought arbitration, said the Court, the dispute as to the right of entry into the stores was not arbitrable. "They are not given that right under the contract."

By ruling as it did, overturning the arbitrators' judgment as to the right of the unions to bring the issues before the L-M-C, the Sixth Circuit was undoubtedly finding that whether the employees or the unions could bring a matter to arbitration was not procedural. But this is essentially a problem of complying with the grievance procedures of a contract, as the Ninth Circuit pointed out. Re-

spondent's brief in opposition fails to discuss this phase of the case, and gives no reasoning whatever to sustain its view. The Sixth Circuit's opinion, likewise, did not deal with the issue as involving compliance with the grievance procedure and must, therefore, have erroneously assumed the matter was substantive. (Furthermore, as we have previously pointed out, the Court may not substitute its judgment in interpreting the contract for that of the arbitrators who had previously ruled that the unions did have a right to bring the disputes to arbitration.)

The Ninth Circuit's opinion in *Association of Industrial Scientists v. Shell Development Corporation, supra,* is the correct disposition of the legal issues. On the reasons set forth in the petition, and on the authority of this latest holding, we submit that this case may be summarily reversed on this ground alone. In any event, these divergent holdings present a conflict between the circuits on a question of major importance, which should be resolved by this Court.

II.

Respondent's brief in opposition to the Petition fails to meet the important issues of law involved in this case. Whether a court may deny enforcement of an arbitration award by substituting its judgment for that of the arbitrators as to the right of a union to process a claim to arbitration is neither discussed nor analyzed in the response, which merely assumes that the Court of Appeals was correct in its ruling. Whether the right of a union to bring a case before arbitrators is an issue of substance or procedure is likewise not discussed at all. Respondent seeks to treat these issues by posing one of its own which begs the question. "When an agreement restricts arbitration to grievances of individual employees," says Respond-

ent (Br., p. 2), but the very question in issue is whether the agreement does so restrict arbitration to grievances of individual employees, a matter that was decided adversely to Respondents by the arbitrators when they interpreted the agreement.

In addition to evading the important questions of law in this case, Respondents have taken undue liberties with the facts as they further seek to re-state the questions presented. The third question presented, according to Respondents, was whether a party could present facts to show that "the award was not made by the arbitrator selected by the parties. * * *" The foundation for this purported claim was an attempt to file an amended answer when this case was remanded to the District Court. The proposed amended answer, in Par. 7 thereof (App. 30a), alleged, "* * * that the Toledo Labor-Management-Citizens Committee is forbidden by its charter to serve as an arbitration agency, a fact unknown to the defendants * * * and not discovered by the defendants until after the filing of the amended complaint herein."

This is the sole fact sought to be added to this case. Yet the record is clear that both parties selected the L-M-C to arbitrate their disputes under the agreements. No other arbitrator was chosen. If the L-M-C could not provide the agreed-upon arbitration services, there was no agreement for any other arbiter to preside. Despite this undisputed record, Respondents go so far as to argue (Br., p. 19) that the L-M-C panel which heard the grievances was not an arbitration panel of the L-M-C, and that the Chairman of the L-M-C substituted another arbitration vehicle without the consent of the parties.

This is an unwarranted and exaggerated statement of the issues in this case. Not one of the three questions proposed by Respondents meets any of the major problems in this proceeding.

Petitioners submit once again that the issues are clear enough and the resolution of them certain enough under controlling doctrines of this Court to warrant summary reversal upon a grant of the petition. As previously set forth, the petition should be granted.

Respectfully submitted,

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